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Nos. 87-826, 87-1101

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEROME F. GOLDBERG and ROBERT McTIGUE,
Appellants,

v.

ROGER D. SWEET, DIRECTOR OF THE ILLINOIS DEPARTMENT OF REVENUE, et al.,
Appellees.

GTE SPRINT COMMUNICATIONS CORPORATION,
Appellant,

v.

ROGER D. SWEET, DIRECTOR OF THE ILLINOIS DEPARTMENT OF REVENUE, et al.,
Appellees.

On Appeal From The Supreme Court Of Illinois

CONSOLIDATED BRIEF OF APPELLEES

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QUESTION PRESENTED

Does the Illinois Telecommunications Excise Tax Act, which imposes a 5% tax on all intrastate telecommunications and on only those interstate telecommunications which are originated in or received in Illinois *and* charged to an Illinois service address, satisfy contemporary Commerce Clause requirements which mandate that a tax not discriminate on the basis of state lines, be fairly apportioned and bear a fair relation to the activity of the taxpayer in the taxing state?

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STATEMENT OF THE CASE

Appellants Jerome Goldberg and Robert McTigue filed suit in the Circuit Court of Cook County, Illinois, alleging that Section 4 of the Illinois Telecommunications Ex-

cise Tax Act, Ill. Rev. Stat. ch. 120, paras. 2001-2021 (1987) (the "Act"), (Goldberg Jurisdictional Statement Appendix ("Goldberg J.A.") at 25a) violated the Commerce Clause of the Constitution of the United States. U.S. Const. art. I, §8, cl. 3. Appellant GTE Sprint Communications Corporation ("GTE"), a defendant in the Circuit Court suit, filed a cross-claim against the State of Illinois based on the same alleged constitutional infirmity.[1] Section 4 of the Act provides that:

> A tax is imposed upon the act or privilege of originating in this State or receiving in this State interstate telecommunications by a person in this State at the rate of 5% of the gross charge for such telecommunications purchased at retail from a retailer by such person. To prevent actual multi-state taxation of the act or privilege that is subject to taxation under this paragraph, any taxpayer, upon proof that the taxpayer has paid a tax in another state on such event, shall be allowed a credit against the tax imposed in this Section to the extent of the amount of such tax properly due and paid in such other state.

Ill. Rev. Stat. ch. 120, para. 2004 (1987). (Goldberg J.A. at 29a.)

On cross motions for summary judgment seeking a determination of the constitutionality of Section 4 of the Act, the Circuit Court of Cook County, Illinois, held that Section 4 violated the Commerce Clause of the United States Constitution. (Goldberg J. A. at 18a.)[2] The State of Illinois

[1] Appellants also raised due process and equal protection claims under the United States and Illinois Constitutions; these claims have been abandoned.

[2] The record before the trial court on the cross motions contains virtually no factual evidence. In the cross motions, the State of Illinois, appellants Goldberg and McTigue and appellant GTE dealt with the statute on its face. GTE submitted a short affidavit which

(Footnote continued on following page)

took a direct appeal to the Illinois Supreme Court, which reversed the Circuit Court. (Goldberg J. A. at 17a.) On July 27, 1987, the Illinois Supreme Court issued an opinion, *Goldberg v. Johnson*, 117 Ill. 2d 493, 512 N.E.2d 1262 (1987). (Goldberg J. A. at 4a.)

Sections 2(a) and 2(b) of the Act define "gross charge" (on which Section 4 of the Act bases the tax) as "the amount charged to the taxpayer's service address" in Illinois. Ill. Rev. Stat. ch. 120, para. 2002. (Goldberg J. A. at 25a-26a.) The typical station-to-station interstate telephone call *from* a person in Illinois—a call originated in Illinois and charged to a service address in Illinois—yields a "gross charge" equal to the cost of the call, and the call is taxed by Illinois. The typical station-to-station interstate telephone call *to* a person in Illinois—a call received in Illinois but charged to an originating service address outside Illinois—yields a "gross charge" of zero, and the call is not taxed by Illinois. Similarly, a collect call originated in Illinois but charged to a non-Illinois service address yields a gross charge of zero. In its practical application, the Act levies a tax on every telephone call to or from a person in Illinois that is also charged to an Illinois service address, but exempts from tax every interstate call that is not both originated or received in Illinois and charged to an Illinois service address.

In its opinion, the Illinois Supreme Court evaluated the Act according to its practical effect:

[2] *continued*

described certain aspects of GTE's business. (GTE Jurisdictional Statement Appendix ("GTE J.A.") at 7a-10a.) That affidavit is incomplete as to GTE and is silent as to the business of other interstate telephone companies. The Illinois Supreme Court's review was limited to an analysis of the statute on its face.

> The tax, by its terms, applies only to interstate telecommunications originating or received in Illinois and paid for in Illinois or billed to a service address in Illinois. Not only does the taxable event transpire in Illinois but the "gross charge" for the taxable event must be paid for in Illinois or billed to an address in Illinois.

(Goldberg J. A. at 10a.)

The Illinois Supreme Court reasoned that the Act satisfied the four prongs of the test enunicated by this Court in *Complete Auto Transit, Inc. v. Brady*, 439 U.S. 274, 279 (1977), and used to determine whether a state tax is constitutional under the Commerce Clause and stated that the tax nexus of Illinois over the persons and events taxed by the Act was undisputed; the Act satisfied the apportionment requirement because it did not produce a risk of multiple taxation; the Act did not discriminate against interstate commerce and its credit provision would mitigate any actual multiple taxation; and the measure of the tax under the Act was fairly related to the benefits provided by Illinois to the taxpayer.

SUMMARY OF ARGUMENT

The Illinois Telecommunications Excise Tax Act generates funds for the general revenue of the State of Illinois by imposing a 5% tax on intrastate and interstate telephone calls purchased at retail, when the telephone call is originated or received in Illinois and charged to an Illinois service address. The amount of the tax is a function of the charge for the telephone call and does not depend on whether the telephone call is interstate or within Illinois.

Appellants do not contend that any tax immunity arises solely from the fact that the subject of the challenged tax is an interstate telephone call. It is by now too well settled to require extended discussion that a state may tax interstate commerce, provided that the State possesses the requisite nexus to the taxed transaction and that the tax, as practically applied, does not discriminate against or unfairly burden interstate commerce. Thus, the question here is not whether Illinois may tax interstate telecommunications, but whether the tax Illinois designed is constitutional.

Appellants' Commerce Clause objections to the Act have a single focus—the fact that the tax is assessed on the entire cost of those interstate calls to which it applies. This results, in their view, in three related violations of the *Complete Auto* test for measuring the validity of a state tax under the Commerce Clause.

1. Appellants contend that the tax violates the "second prong" of the *Complete Auto* test, the requirement of fair apportionment. In effect, appellants seek to have this Court judicially legislate a tax different and considerably less practical than the Act. Appellants' central premise is that in any long distance call at least two states (those where the originator and the recipient to the call are located) have nexus to tax an interstate call. Further, appellants suggest that intervening states through which a call might pass have nexus and are also entitled to a share of the tax base. They then reason that Illinois may not tax more than its fair share (presumably, 50% or less) of any interstate call. By basing the tax on the entire cost of any taxed call, Illinois has, appellants insist, taken more than its fair share as its tax base.

Appellants' argument depends upon a purposeful distortion of the practical operation of the interstate telecom-

munication system and the governing law. The interstate telephone system is a complex electronic network that does not send each interstate call over a standard route. Moreover, appellants' argument ignores the fact that the tax is imposed only on those telephone calls that meet the statutory requirements of origination or receipt in Illinois and a charge to an Illinois service address. Illinois does not tax those numerous other interstate telephone calls which, although they originate in, are received in, or pass through Illinois, are not charged to an Illinois service address. Inasmuch as appellants' premise is that at least two states might tax a telephone call, their argument becomes a demand for apportionment of every call.

The Act fully and fairly apportions the universe of telephone transactions between Illinois and other states. Moreover, the Act is no different in its practical effect and economic substance than sales, use and gross receipts taxes that have been approved by this Court.

Lastly, any possible deficiency in apportionment is guarded against by the credit mechanism of the Act, which provides that a taxpayer who has paid a tax to another jurisdiction on an interstate call charged to the taxpayer's Illinois address shall receive a credit against his liability under the Act. This provision serves to adequately apportion the tax in and of itself.

2. The appellants contend that in its practical effect, the Act treats interstate and intrastate commerce differently. The appellants' argument is without support. The Act, both on its face, and in practical application, treats interstate and intrastate commerce identically. This is confirmed by application of the "internal consistency" principle. If every state adopted the same tax as that imposed by Illinois, no call would be taxed on more than 100% of its cost. In order to avoid the conclusion that the Act

satisfies the principle of "internal consistency", the appellants seek to expand the concept of internal consistency by hypothesizing different tax systems in different states, and considering the cumulative effect of those different systems on carefully selected examples. There is no support for expanding the internal consistency test in this fashion.

The Act also satisfies what this Court has called the requirement of "external consistency"—that the basis chosen for determining the taxing state's share of the total tax potential not produce grossly distorted results. Appellants have made no showing that a disproportionate share of interstate calls are charged to the service address of the Illinois participant. Accordingly, the Act is externally consistent.

3. Finally, the Illinois tax is faulted on the ground that its measure—the cost of the call charged to a customer—lacks a fair relation to the protection or services provided by the State to that customer. Fair relation is violated, appellants claim, because distance is one of the main variables affecting the cost of a call and a large part of the distance between the parties to most interstate calls will be outside Illinois.

If valid, the effect of this objection, like appellants' apportionment objection, would be to require Illinois to measure the tax on the basis of something other than the cost of the call to a customer. This objection is, however, not valid. First, taxation on the basis of the value or cost of the taxed good or service is commonplace and has never been thought to be unconstitutional simply because part of the value being taxed derives from economic activity in other states. If appellants' position were correct, the entire foundation for sales, use, gross receipts and other common types of state taxes would crumble. For example,

a sales tax—indeed the instant tax is functionally indistinguishable from a sales tax on long-distance interstate telephone calls—unquestionably can apply to goods purchased outside the taxing state yet be measured by the amount of the sale. This is true even though the "services" provided by the taxing state bear little direct relation to the cost or value of the goods sold.

Second, the taxpayer is in Illinois during the telephone call which provides the basis for tax. That person is, therefore, enjoying the benefits and privileges afforded by Illinois, such as fire and police protection. This alone is sufficient to satisfy the fair relation requirement.

Third, the challenged tax is not a user fee, like the highway taxes at issue in *American Trucking Associations, Inc. v. Scheiner*, ___ U.S. ___, 107 S. Ct. 2829 (1987). In such instances, it may be appropriate to require that the measure of the tax bear some relationship to the services provided by the State, but the same requirement is neither needed nor imposed for general revenue taxes.

In sum, Illinois has constructed a tax that apportions to the State no more than its fair share of the total universe of potentially taxable interstate transactions and that reasonably assures the taxpayer that his interstate calls will be free of any added tax burden attributable to the fact that state lines have been crossed. Moreover, including the tax on the bill sent to the person to whom the call is charged is by far the most practical means of levying and collecting a tax of this nature. No state imposes a tax using any of the absurd, impractical and constitutionally questionable means that would be necessary to satisfy appellants' demand for call-by-call apportionment.

ARGUMENT

The Act applies to "the act or privilege of originating in this State or receiving in this State interstate telecommunications" and is measured "at the rate of 5% of the gross charge for such telecommunications purchased at retail." Ill. Rev. Stat. ch. 120, para. 2004. According to the definition of "gross charge", found in Sections 2(a) and 2(b) of the Act, the tax is levied only upon "the amount charged to the taxpayer's service address in the State."

Nothing in the Commerce Clause prohibits a tax on interstate telephone calls. As this Court recently stated, "*Complete Auto* abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the States." *D. H. Holmes Co. v. McNamara*, No. 87-267, slip op. at 6 (U.S. May 16, 1988), 56 U.S.L.W. 4400. Indeed, appellants do not claim that Illinois may not tax interstate telephone calls, but rather appellants argue that the method Illinois has employed to exact its tax violates requirements designed to safeguard interstate commerce from unfair or discriminatory state taxation.

Commerce Clause jurisprudence has established four such requirements: (1) the taxing state must possess nexus; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must bear a fair relation to the taxpayer's activity in the state. *Complete Auto*, 430 U.S. at 279.

Appellants do not question that Illinois has nexus to tax interstate phone calls that involve a party in Illinois and are charged to an Illinois service address. They attack the Act because the interstate telephone calls subject to the Act are taxed on the entire cost of the call, rather

than some lesser portion.[3] This, it is claimed, makes the tax "completely unapportioned, . . . subjects the telecommunications to multiple state taxation, . . . increases as the State's contact with the telecommunication decreases, and . . . lays a heavier burden on interstate telecommunications than intrastate telecommunications." (Goldberg Brief at i.) Appellants insist that the only method of properly taxing the retail cost of any interstate call must involve the apportionment of the cost of each call among several states. The vice of appellants' argument is that the Constitution does not require any particular method of taxation and certainly not the one suggested by appellants. All that is required is that interstate commerce not be unduly burdened. The Act meets this important requirement because it satisfies the tests set forth in *Complete Auto.*

I. THE ILLINOIS TAX IS FAIRLY APPORTIONED.

The purpose of the apportionment requirement is to ensure that states taxing multistate activity do not allocate to themselves more then their fair share of that activity. This safeguards taxpayers engaged in interstate commerce from excessive tax burdens attributable to the fact that

[3] We accept for purposes of this discussion appellants' hypothesis that what is being taxed by Illinois is the interstate phone call itself, rather than its purchase in Illinois. As explained in the text, the tax is nevertheless fairly apportioned. As a matter of economic reality, however, it is the purchase that is taxed, since the tax in fact applies only to Illinois purchases (*i.e.*, to calls charged to an Illinois number). So viewed, there is no need to apportion the tax on a call-by-call basis, because the limitation to Illinois purchases accomplishes all of the purposes that the apportionment requirement is designed to accomplish, leaving to other states the unimpaired power to tax calls purchased there.

their activities take place in more than one state with sufficient nexus to impose a tax. Apportionment allows states to allocate among themselves the universe of activity being taxed.

The Act is fairly apportioned. First, it taxes only a fair portion of the telephone calls that appellants claim Illinois has nexus to tax. Second, the Act is constitutionally indistinguishable from other taxes that have been approved by this Court. Third, the method of apportionment utilized by the Act is superior to any suggested by appellants. Lastly, the Act provides a credit which, in and of itself, acts as a method of providing fair apportionment.

A. The Act Taxes Only A Fair Portion Of Calls Touching Illinois.

It is fundamental to appellants' reasoning that any state in which a participant to a telephone call is located or through which an electronic telephone signal passes has nexus to tax some portion of the cost of that call. The Act apportions the universe of telephone calls that are potentially available to Illinois for taxation by taxing only those telephone calls that include an Illinois participant who charges the telephone call to an Illinois service address. This means that Illinois does not tax calls that include Illinois participants but are charged to a service address in another state, or calls that are transmitted through Illinois but do not include an Illinois participant. The fact that Illinois taxes only a portion of the telephone calls which it has nexus to tax, demonstrates that the Act is apportioned.

The fairness of the method of apportionment chosen by Illinois is demonstrated by the fact that it passes both

the internal consistency test and the external consistency test described in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) and *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983). The Act passes the internal consistency test because if the same statute were passed in every state, no interstate telephone call would be taxed more than once. Moreover, the external consistency test is met unless the appellant makes a showing that the method of apportionment is out of all proportion to the activity being taxed and thereby creates grossly distorted results. No such showing has been made or even offered by the appellants.[4] The Act is, therefore, fairly apportioned.

B. The Act Has The Same Economic Effect As Other Taxes Which Have Consistently Been Regarded By This Court As Fairly Apportioned.

Other taxes, including sales, use and gross receipts taxes, have consistently withstood constitutional scrutiny. These taxes are imposed on activities that are inextricably linked to interstate commerce and are apportioned among the states, not on a transaction by transaction basis, but on the basis of where sales are made. The practical effect of the Act is the imposition of a tax equal to 5% of the retail purchase price of an interstate telephone call charged in Illinois. As such, it is functionally indistinguishable from the sales, use and gross receipts taxes previously upheld by this Court. It should be evaluated in the same manner.

[4] The internal consistency test and external consistency test have been used to test fair apportionment and discrimination. Internal and external consistency are discussed in greater detail below. See pp. 30-33 *infra*.

The functional equivalence of the Act to sales, use and gross receipts taxes overshadows the various characterizations which the appellants have attempted to affix to the Act. This Court has consistently held that it is the practical effect of a state tax that determines its constitutionality, and not the labels used by the state statute, the lower courts or the litigants. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615-16 (1981); *American Trucking Ass'ns v. Scheiner*, ____ U.S. ____, 107 S. Ct. 2829, 2846 (1987). In other words, the Act should be judged on what it does and not what it is called.[5]

In *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940), the Court was faced with a Wisconsin dividend tax on shareholders of corporations doing business in Wisconsin. The Wisconsin Supreme Court held that because the process of declaring dividends and the details of their distribution took place outside of Wisconsin, the tax was an unconstitutional attempt to tax activity beyond Wisconsin's borders. The Court reversed and stated that:

> Had Wisconsin . . . provided for a supplementary tax on the Wisconsin earnings of such corporations, but postponed liability for the tax until such earnings were to be paid out in dividends, the power of Wisconsin to do so would hardly be questioned.

[5] The Illinois Supreme Court's statement that the taxable event is not a "retail purchase" (Goldberg J. A. at 9a) does not preclude evaluating the tax in light of its retail purchase characteristics. The Illinois Supreme Court's comment concerning retail purchase simply indicated that it recognized that "the taxable event is linked inextricably to interstate activity" and, therefore, would not be immune from Commerce Clause scrutiny. (Goldberg J. A. at 9a.)

The Court continued:

> The case thus reduces itself to the inquiry of whether Wisconsin has transgressed its taxing power because its supreme court has described the practical result of the exertion of that power by one legal formula rather than another—has labeled it a tax on the privilege of declaring dividends rather than a supplementary income tax .... But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction.

Id. at 442-43.[6]

When the Act is viewed in light of its practical economic effect, it is no different than other types of taxes which have withstood challenge on Commerce Clause grounds. Sales taxes, which most closely resemble the Illinois tax, have consistently satisfied principles of fair apportionment.[7] In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940), the Supreme Court upheld a New York sales tax on goods shipped from outside of New York. This Court specifically rejected an argument that the tax should be held unconstitutional because it was unapportioned.

Similarly, use taxes, measured by the cost of items used within a state, have withstood Commerce Clause scrutiny.

[6] *Holmes*, No. 87-267 (U.S., May 16, 1988), does not undercut the principle advanced in *J. C. Penney*. In *Holmes*, this Court properly deferred to the Louisiana court of appeals' determination that certain activity was subject to Louisiana's use tax. *Holmes* does not restrict this Court's ability to look at the economic substance of a tax in evaluating it for Commerce Clause purposes.

[7] Indeed, if one postulates an Illinois sales tax applicable to the purchase of telephone calls, it would operate in exactly the same manner as the Act.

Just last term, in *Holmes*, this Court held that a Louisiana use tax on catalogues was fairly apportioned. The Louisiana tax was based on the full value of goods which were manufactured and purchased in another state and mailed from that state into Louisiana for use in Louisiana.

Taxes based on gross receipts that are allocated among the states based on where the gross receipts are earned have also been sustained without requiring apportionment of each transaction among several states. In *Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560 (1975), this Court recognized the validity of apportionment based on sales to local consumers and stated:

> In the instant case, as in *Ficklen v. Shelby County Taxing District*, 145 U.S. 1, 12 S.Ct. 810, 36 L.Ed. 601 (1892), the tax is on the gross receipts from sales made to a local consumer, which may have some impact on commerce. Yet as we said in *Gwin, White & Prince, supra*, 305 U.S., at 440, 59 S.Ct., at 328, in describing the tax in *Ficklen*, it is "apportioned exactly to the activities taxed," all of which are intrastate.

419 U.S. at 564.

More recently, in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, ____ U.S. ____, 107 S.Ct. 2810, 2822 (1987), this Court stated that a form of gross receipts tax imposed by Washington did not violate the fair apportionment standard for failure to allocate or apportion between the state of wholesaling and the state of manufacturing.

If Illinois had enacted a gross receipts tax on carriers that supply interstate telephone services and had apportioned that tax by sales, the tax would satisfy constitutional apportionment standards. In *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), the Court upheld an in-

come tax apportioned by sales within a state, and observed that:

> [I]t is evident that appellant would have had no basis for complaint if, instead of an income tax, Iowa had imposed a more burdensome gross-receipts tax on the gross receipts from sales to Iowa customers.

Id. at 280. While the legal incidence might be different, the practical economic effect of the Act would be virtually the same if the tax were imposed on the Illinois gross receipts from interstate calls of carriers such as GTE rather than on the cost of those same calls to the parties who charged them to their Illinois service addresses.

For Commerce Clause purposes, the Act should not be treated differently than the sales tax in New York on goods produced elsewhere, the use tax in Louisiana on catalogues produced and shipped from out of state and the gross receipts tax in Washington on revenue derived from goods manufactured out of state and shipped for sale and delivery in interstate commerce. The Act's method of apportionment is consistent with this Court's view of the Commerce Clause as it is applied to a wide range of state taxes.

C. The Constitution Does Not Mandate The Selection Of A Particular Method Of Apportionment. The Act Selects A Method Superior To Any Suggested By Appellants.

Illinois' method of apportionment works by allocating to the State only its fair share of the total set of potentially taxable calls and applying the tax to the full value of those calls. There is no evidence that the method adopted by Illinois will generate any revenue beyond that which would be derived if each telephone call were apportioned individually. Consider the set of two-party interstate calls

between persons in Illinois and persons in Indiana. It can reasonably be predicted that approximately one-half of those calls will be charged to service addresses in Illinois, the other half to service addresses in Indiana. As a result, ~~the Act~~ will be applied to approximately 50% of Illinois-Indiana interstate calls—an outcome functionally indistinguishable from that produced by a tax that apportioned each individual two-party call half to Illinois and half to Indiana. There is no difference between taxing 50% of all calls including an Illinois participant based on 100% of the charge and taxing 100% of the calls involving Illinois participants based upon 50% of the charge. Illinois has chosen one method of apportionment available to it. Given the purposes of the apportionment requirement—to give each state the opportunity to tax its fair share of multi-state transactions, while protecting the taxpayer involved in interstate activities from multiple tax burdens—there is no reason to require an alternative method of apportionment merely because it too may produce a fair result.

Apportionment of individual transactions is not mandated when the method of apportionment selected by a state yields a fair result. This common-sense conclusion is confirmed by decisions of this Court which have allowed different apportionment methods to exist side-by-side and have upheld formula apportionment in lieu of transactional accounting. See *Moorman*, 437 U.S. at 273 (1978); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 164-65 (1983). Appellants' briefs, while replete with citations to cases that stand for the non-controversial generality that taxation of multistate activities must be fairly apportioned, cite not a single precedent, holding or suggestion that transaction by transaction apportionment is generally required by the Commerce Clause.

Once deprived of the opportunity to insist on apportionment of individual transactions, appellants' non-apportionment argument collapses. Moreover, there is no reasonable or practical method to implement transaction-by-transaction apportionment. Any practical means of apportionment must recognize and follow the attributes of the activity being taxed. As amicus MCI points out, there is no way to routinely record the particular route an interstate telephone call takes when moving from state to state. MCI further points out that it is impossible to meaningfully apportion the charge for a particular call among the States. Moreover, "the very number of calls involved demonstrates that, even if it were technically feasible to record and analyze routinely the routing of every call, the time, equipment, and expense involved for the carriers would be enormous." (MCI Brief at 2.)

When viewed against the real world, the methods of transaction by transaction apportionment that are implicitly suggested or explicitly endorsed in appellants' briefs are no more effective in avoiding multiple tax burdens and are either legally questionable or exceedingly impractical, if not impossible, to implement.

1. Mileage Apportionment Is Legally Suspect And Practically Impossible.

One proposal suggested at various places in appellants' briefs is that the cost of a call should be apportioned on the basis of the mileage between the callers' locations. This notion is not feasible. It would mean, for example, that 90% or more of a call between Illinois and California would have to be allocated for taxation by Iowa, Nebraska, and other intervening states. As amici MCI and the National Conference of State Legislatures et al. point out, there may be no intervening states. Moreover, because electronic messages do not travel from one caller to another on a direct, horizontal line, and because the route taken by a telephone call varies each time a call is made, mileage apportionment becomes a practical nightmare. (MCI Brief at 1-2; National Conference Brief at 5-10.) Appellants' suggestion of mileage apportionment is a chimera.

MCI's description of switching systems shows that the route a call takes is controlled by elaborate computer programs that are generally designed to maximize, on a call-by-call basis, elements such as line quality, consistency, response time, and connection speed. In addition, once a route is chosen, the call may travel over any combination of media including microwave relay, fiber optic cable, satellite systems, or traditional telephone lines. In a satellite transmission, a signal may be beamed from a ground station in one caller's state to a satellite and back to a ground station in the second caller's state. In such transmissions, the country may be spanned but no signal will travel in the territory of any state between the eastern and western seaboards. Even when the signal proceeds through the air by a series of microwave relays, the routing could be quite circuitous, so that the states through which the microwaves pass cannot be determined by looking at a map or by any other consistent reliable means. (MCI Brief at 1-2.) Thus, appellants' implicit suggestion that mileage or distance is an appropriate method of apportionment is destroyed when one recognizes that a tax based on mileage and imposed by the originating, receiving or intervening states is an impossibility to administer.

Further, limited contact between the telecommunication and the intervening states makes it uncertain whether the intervening states would possess nexus to tax the call at

all, let alone to take the lion's share. See *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302-304 (1944) (Jackson, J., concurring) (no nexus to impose property tax on aircraft that pass through super adjacent airspace); 1 J. Hellerstein, *State Taxation* ¶ 10.2[6] at 646 (1983). Accordingly, the result of a mileage or distance apportionment formula could well be that *no* state would be able to tax most of the cost of a typical interstate call. Such an outcome might be convenient in insulating telecommunications from taxation, but it surely cannot be required by the Constitution.[8] It is no coincidence that appellants could not find a single state that has ever attempted to tax an individual interstate telecommunication on the basis of its geographical location along the route of the communication. (See GTE Brief App. at 1a-3a.)

2. Mileage Apportionment Is Not Mandated By Prior Court Rulings.

Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948) and *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1954) are the only cases cited by appellants that could be thought to support their position that apportionment based on distance or mileage is required by the Constitution in this case. Neither case has been much cited by this Court in its subsequent decisions, and both cases

[8] As the Court stated in *Complete Auto*:

> It might also be argued that adoption of a rule of absolute immunity for interstate commerce (a rule that would, of course, go beyond *Spector*) would relieve this Court of difficult judgments that on occasion will have to be made. We believe, however, that administrative convenience, in this instance, is insufficient justification for abandoning the principle that "interstate commerce may be made to pay its way."

430 U.S. at 289 n.15.

seem to rely on out-dated hypertechnical principles of Commerce Clause jurisprudence. In addition, each is distinguishable from the instant case.

Central Greyhound involved a tax on gross receipts from the sale of tickets on trips between cities in New York State, when the buses passed through, and made intermediate stops at, points in Pennsylvania and New Jersey. The Court held that New York could not tax the entire receipts from such trips, because such a tax would create the risk of multiple taxation if the intervening states, which were recognized to have tax nexus, also taxed their "share" of the same receipts. Instead of taxing the entire revenues from this travel, New York had to be satisfied with an apportioned share.

Central Greyhound's holding has limited usefulness. The mileage apportionment used in *Central Greyhound* cannot be readily applied to other means of conveyance or communication. In *Pan American World Airways, Inc. v. Virgin Islands*, 459 F.2d 387 (3d Cir. 1972), the plaintiff sought to have the court declare that the Virgin Islands' gross receipts tax as applied to an international air carrier was an unapportioned gross receipts tax and, therefore, a violation of the Commerce Clause. The Virgin Islands imposed a tax of 2% of the gross receipts from all tickets sold in the Virgin Islands and 2% of all revenues received in the Virgin Islands for carriage of baggage or freight irrespective of origin and destination of such traffic. The plaintiff relied principally on *Central Greyhound* to support its contention that mileage within the territory versus total mileage was the only permissible allocation formula. A mileage based formula would have yielded a tax equal to about 10% of the tax actually imposed. The Court of Appeals distinguished *Central Greyhound* stating that *Central Greyhound* "is no authority

for the proposition that allocation based on mileage is the only permissible form of allocation." *Id.* at 394. The Court of Appeals held that the tax was constitutional.

Given the nature of interstate telecommunications, mileage is not a suitable method of apportionment. Simply put, telecommunications are not at all like the passage of a bus along a highway. There is only the most ephemeral connection, if any, between geographically intervening states and the passage of the electronic signal from the telephone in Illinois to the telephone in California.

The tax at issue in *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954) was criticized because an artificial event, the "first taking" of gas, was created in order to tax the transportation of gas through a pipeline. The Court found that a similar artificial event could have been created by each state that the gas passed through. The case has no application here. Illinois taxes the origination or receipt of a telephone call charged to an Illinois address—a real event that takes place millions of times a day. The Act does not depend upon a legislative construct which can be duplicated by all of the states along the path of a telephone call. *Michigan-Wisconsin* is not a bar to the Illinois tax because Illinois taxes an actual event. It does not attempt to create an artificial event that would allow Illinois to tax the entire value of all interstate calls which pass through or into Illinois.

3. Imposing A Tax On Each Participant To A Telephone Call Is Not Constitutionally Mandated.

Contrary to appellants' position, the Constitution does not require apportionment on a transaction by transaction basis. See *Container Corp. of America v. Franchise Tax Bd.,*

463 U.S. 159, 164-65 (1983).[9] Illinois has selected a method of apportionment that is fair and that works. Alternatives that can be imagined seem plainly inferior to, and certainly are no better than, the Illinois apportionment method.

Consider call-by-call apportionment such as appellants seem generally to insist is constitutionally required. GTE claims to have the capability to "bill more than one state's tax on one bill for the same phone call." (GTE Brief at 32 n.13.)[10] Thus, it apparently proposes to compute, assess, itemize and collect from the party to whom the call is charged, and remit to each participant's state, the amount representing its apportioned share of the total. In the case of appellants' hypothetical 12-party conference call (Goldberg Brief at 30), the bill to the charged party—which would indeed be a formidable document—would show the tax from each of those states.

Even if technically possible, this system seems highly impractical, does no better than the challenged Illinois tax in distributing fair tax shares among the states, and raises

[9] The Goldberg appellants quote out of context a statement in *Mobil Oil Corp. v. Comm'r of Taxes,* 445 U.S. 425, 444 (1980), that would appear to suggest that *allocation* of potentially taxable transactions among the various states with tax nexus might be "incommensurate" with an *apportionment* process. (Goldberg Brief at 17 n.10; see also GTE Brief at 28.) But the question under discussion in *Mobil* was whether a state could allocate to itself *all* dividend income from business transacted in various states. Illinois does not allocate to itself all revenues from Illinois-linked calls.

[10] The quoted language does not say that GTE is capable of billing a tax to any participant other than the participant paying for the call. Nor does it suggest that GTE is capable of performing any of the sophisticated apportionment schemes to which appellants allude in their briefs. The only real evidence of GTE's capabilities in this regard is its apparent inability to add 5% to its customers' bills for interstate telephone calls for a period of several months. (GTE Jurisdictional Statement at 6.)

serious constitutional questions. In the case of a hypothetical call between Illinois and California, it is questionable whether California would have nexus to tax the Illinois party. See *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 754 (1967) (no nexus to collect the use tax from seller whose only connection with taxing state was through mail and common carrier). The nexus problem could be avoided by a modified version of this split-tax approach under which each participant to the call would be taxed by his own state. Suppose that a hypothetical call between Illinois and California cost $2.00, and that both States imposed a 5% tax on their apportioned share—$1.00 each. If the call were charged to the Illinois caller, his bill would be $2.05; the California participant would receive a bill for $.05 California tax.

It seems beyond question that such a scheme would produce objections from many quarters, including GTE and other carriers, since this split billing would be difficult or impossible to administer. Moreover, the scheme would be unfair to recipients of unwanted long-distance calls—for example a long-winded sales pitch from someone in a distant state attempting to sell "choice parcels" of desert real estate—who would be forced to pay tax on such calls. The Constitution may permit such a taxing arrangement, but it seems hard to believe that it requires it, especially when the current Illinois approach produces equally fair results. Again, appellants cannot point to a single state that pursues any of these forms of call-by-call apportionment.

The Goldberg appellants point to other states' "efforts to avoid multiple taxation" as being superior to the Illinois approach. (Goldberg Brief at 29.) But the examples they give do not support their conclusion. Florida's tax on *privateline* communications must use a different

method of apportionment because there is no separate charge for individual calls; significantly, where individual calls are separately charged and can be allocated among the states involved, Florida apparently employs the same apportionment system as Illinois. (See GTE Brief App. at 1a.) As for Virginia's use of circuit capacity as a means of apportioning its gross receipts tax, there has been no showing whatsoever that this is any better than an apportionment based on where individual calls are charged. As *Moorman* and *Container Corp.* make clear, the Constitution does not put this Court in the business of choosing among generally fair methods of apportioning taxes. That job, if it needs to be done, is for Congress and the state legislatures.

D. The Credit Provided By The Act Also Satisfies The Apportionment Requirements.

The method of apportionment used by Illinois—allocating the interstate call to the state in which it is charged—is entirely fair and fully satisfies all Commerce Clause policies. Although Illinois is under no constitutional obligation to provide any credit for taxes on the same call which other jurisdictions may seek to impose under different taxing schemes, Illinois does, in fact, provide a credit.[11] Persons such as appellants Goldberg and McTigue run no risk of being compelled to pay tax on more than the full cost of any call they may make. In *Holmes*, the Supreme Court expressly recognized that such a credit scheme,

[11] The credit mechanism becomes significant when, as in *Tyler Pipe*, a tax is not otherwise internally consistent. But if a tax is internally consistent, the credit should be wholly unnecessary to sustain its validity. The Act is internally consistent. See *infra* pp. 30-32.

identical to the one used in the Act provides, in and of itself, proper apportionment:

> The Louisiana taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States. See La. Rev. Stat. Ann. § 47:303(A) (West 1970) ("[a] credit against the use tax imposed by this Chapter shall be granted to taxpayers who have paid a similar tax upon the sale or use of the same tangible personal property in another state"); § 47:302(A)(2) (instructing that "there shall be no duplication of the tax"); § 47:321(A)(2) (West Supp. 1988) (same). Holmes paid no sales tax for the catalogs where they were designed or printed; if it had, it would have been eligible for a credit against the use tax exacted.

Slip op. at 6-7.

Appellants, whose briefs were filed before *Holmes* was decided, attack the credit provision because it applies only to taxes paid by the Illinois taxpayer, and not to those paid by others. In *Holmes*, the Louisiana credit was available only to the taxpayer and was nevertheless found to be a satisfactory method of apportionment.

II. THE DISCRIMINATION THAT THE COMMERCE CLAUSE GUARDS AGAINST IS PENALIZATION OF COMMERCE FOR CROSSING STATE LINES. THE ILLINOIS TAX IS INTERNALLY AND EXTERNALLY CONSISTENT AND PRODUCES NO IMPERMISSIBLE DISCRIMINATION.

Both appellants argue that the Act impermissibly discriminates against interstate commerce. (Goldberg Brief at 30-33; GTE Brief at 33-47.) The appellants support their argument by examples of telephone calls which involve in-state and out-of-state participants. The appellants' position is that discrimination has occurred because an in-state

call with a cost equal to an interstate call will be taxed an equal amount. The argument is without support in law. The discrimination the Commerce Clause is designed to prevent is a penalty for crossing state lines and although the cost of a long-distance call is in part a function of distance, there is no evidence that it has anything to do with crossing state lines.

In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), this Court recognized that taxes which impose the same rate without regard to whether the transaction crosses state lines do not result in discrimination.

> [T]he Montana tax is computed at the same rate regardless of the final destination of coal, and there is no suggestion here that the tax is administered in a manner that departs from this evenhanded formula.
>
> * * *
>
> The premise of our discrimination cases is that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." Under such a regime, the borders between the States are essentially irrelevant. As the Court stated in *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255, 31 S.Ct. 564, 571, 55 L. Ed. 716 (1911), " 'in matters of foreign and interstate commerce there are no state lines.' "

Id. at 618-19 (citations omitted).

Faced with Illinois' evenhanded tax on both interstate and intrastate telephone calls, appellants make a discrimination argument based on a series of hypothetical telephone transactions. For example, the Goldberg appellants pose a hypothetical in which two calls are made from Chicago, one to Joliet, Illinois, and one to Gary, Indiana, each of which costs $2.00. (Goldberg Brief at 31.) They suggest that because each of the two calls bears the same ten cent tax and because the in-state call has two partici-

pants in Illinois and the interstate call has only one participant in Illinois, unlike subjects are being treated equally. They then argue that such equal treatment of unlike subjects is discriminatory. But, of course, not all calls between Chicago and Gary are charged to a Chicago number. The logically correct analysis thus requires the inclusion of the reciprocal calls from Joliet to Chicago and from Gary to Chicago. On the average, each call between Joliet and Chicago would be subject to a ten cent tax. On the other hand, on the average, each call between Gary and Chicago would be subject to a five cent tax. This is the case because approximately one-half of the calls would be from Chicago to Gary and would be taxed at the rate of ten cents per call, and approximately one-half of the calls would be from Gary to Chicago and would not be taxed at all. Thus viewed there is no discrimination.

The Goldberg appellants' other hypothetical compares calls of the same duration, one within Illinois and the other between Chicago and Los Angeles, and contends that, because the charge on the latter will be greater, this indicates discrimination against the interstate call. (Goldberg Brief at 31-32.) This argument seems principally to belong in the discussion of "fair relation" since it is really an attack on the notion that the cost of a taxed item is a proper basis for measuring the tax. The issue of fair relation is addressed at pp. 33-36 *infra*. The problem is not really one of discrimination against interstate commerce. For example, a call from Chicago to Carbondale may cost more and, therefore, could be more heavily taxed than one from Chicago to Gary. Thus, the cost of a long-distance call is in part a function of distance, but there is no evidence that the cost has anything to do with crossing state lines.

GTE suggests both hypothetical and actual taxes that are imposed on calls "billed or paid" within the taxing jurisdiction. (GTE Brief at 35-36.) GTE then considers the effect of such taxes on a call that is charged to an Illinois service address but billed to an address in one of the "billed or paid" jurisdictions, arguing that the taxation of such calls by both jurisdictions creates an unlawful multiple tax burden. Because the vast majority of calls are charged and billed to the same number, GTE's argument is of no real significance.

Moreover, GTE's argument (as well as that of the Goldberg appellants) wholly overlooks the significance of the holding in *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978). Unlike the strained, largely imaginary, and totally insignificant multiple tax burdens that GTE conjures up, the one-factor Iowa apportionment formula upheld in *Moorman* created actual multiple tax burdens for some taxpayers when juxtaposed with traditional three-factor formula used by most other jurisdictions. The Court nevertheless found no violation of the Commerce Clause. The Court stated:

> [S]ome risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income. Accepting appellant's view of the Constitution, therefore, would require extensive judicial lawmaking. Its logic is not limited to a prohibition on use of a single-factor apportionment formula. The asserted constitutional flaw in that formula is that it is different from that presently employed by a majority of States and that difference creates a risk of duplicative taxation. But a host of other division-of-income problems create precisely the same risk and would similarly rise to constitutional proportions.
>
> Thus, it would be necessary for this Court to prescribe a uniform definition of each category in the

> three-factor formula. For if the States in which a corporation does business have different rules regarding where a "sale" takes place, and each includes the same sale in its three-factor computation of the corporation's income, there will be duplicative taxation despite the apparent identity of the formulas employed. A similar risk of multiple taxation is created by the diversity among the States in the attribution of "nonbusiness" income, generally defined as that portion of a taxpayer's income that does not arise from activities in the regular course of its business. Some States do not distinguish between business and nonbusiness income for apportionment purposes. Other States, however, have adopted special rules that attribute nonbusiness income to specific locations. Moreover, even among the latter, there is diversity in the definition of nonbusiness income and in the designation of the locations to which it is deemed attributable. The potential for attribution of the same income to more than one State is plain.

Id. at 278-279. (footnotes omitted)

The essence of the holding in *Moorman* is that a tax apportioned according to where sales are made will not violate the Commerce Clause even though some taxpayers suffer multiple tax burdens because of the interaction of the tax with a different tax of another state.

In addition to the basic requirement that statutes not discriminate on their face, recent Supreme Court opinions have demanded that state taxes be internally consistent so as to avoid discrimination against interstate commerce. The doctrine of internal consistency requires that if the tax at issue were imposed by each state, interstate commerce would be subjected to no greater burden than intrastate commerce.

The Act passes this test of internal consistency. If every other state adopted the same tax, no call would be taxed more than once, because the tax applies only to calls charged to a service address in the taxing state. Appellant GTE's attempt to avoid this conclusion is disingenuous. (GTE Brief at 26-29.) Seizing on the phrase "like tax" in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984), GTE posits that other states might adopt taxes generally similar to, but in significant respects different from, the Illinois tax. Insofar as these hypothetical taxes differ from one another, GTE points out that those differences might produce multiple taxation of particular taxed transactions.

This "reasoning" totally defeats the logic of the internal consistency principle. Indeed, whenever there is more than one fair method for taxing a transaction, no method could ever pass GTE's reformulation of the internal consistency standard, because it is the differences in the various methods of taxation that produce the theoretical possibility of multiple taxation.[12] In order for internal consistency to be an effective litmus test, it must be assumed that other states adopt a tax identical to the challenged tax.

The constitutionality of the Illinois tax under the internal consistency test should be compared with the failure under the internal consistency test of the tax at issue in *American Trucking Ass'ns, Inc. v. Scheiner*, ____ U.S. ____, 107 S.Ct. 2829 (1987). In *American Trucking*, this

[12] If GTE's reformulation of the internal consistency test had been applied in *Moorman* or *Container Corp.*, the taxes in both cases would have failed the test. Indeed, given the infinite number of methods of income tax apportionment which can be conceived of, it is difficult to imagine an income tax which would satisfy the GTE reformulation of the internal consistency test.

Court held unconstitutional certain flat taxes on trucks which traveled in the Commonwealth of Pennsylvania because the Pennsylvania taxing scheme failed the internal consistency test. If the tax imposed by Pennsylvania were imposed in all fifty states, a truck which traveled in all states would pay fifty times more tax than a truck which stayed in Pennsylvania, even if each truck traveled the same number of miles. Therefore, the Pennsylvania statutes imposed an impermissible burden on interstate commerce. Conversely, if the Act were imposed in every state, a caller placing interstate telephone calls from each of the fifty states would pay exactly the same tax as a caller who placed interstate calls with identical charges exclusively from Illinois.

The Illinois tax is also externally consistent. Where the requirement of internal consistency is a matter of logic and structure, the external consistency principle is an empirical safety valve that empowers the Court to protect commerce against the effects of a tax that claims for the taxing state a share that is "out of all appropriate proportions to the business transacted . . . in that State," or leads to "grossly distorted result[s]" or is "outrageous in a particular case." *Container Corp.*, 463 U.S. at 170, 182-183 (citations omitted).

As *Container Corp.* makes clear, the burden of proving a lack of external consistency is on those who claim that a tax operates in an unfair or distorted manner. Here, an issue of external consistency might arise if it were shown that a highly disproportionate percentage of calls between parties in Illinois and parties in other states are charged to service addresses in Illinois. Appellants have made no allegation that such a state of affairs exists. Indeed, the individual appellants have not alleged that they have paid a penny more in tax than they would

have paid if, instead of taxing only those of appellants' interstate calls charged to their own numbers, the State had instead taxed an apportioned share of every interstate call in which appellants participated.

III. THE ILLINOIS TAX IS FAIRLY RELATED TO THE ACTIVITY OF THE TAXPAYER.

The tax at issue in this case is measured by the charge for the taxed transaction. This is the virtually uniform method by which transaction taxes, such as sales, use and gross receipts taxes are assessed. Appellants' suggestion that the Illinois tax violates the requirement of fair or reasonable relationship to the taxpayer's activities or presence in the state is an attack on this well established method of taxation.

Simply stated, appellants' objection is that the cost of the interstate call, which provides the measure of the tax, depends in part on the distance between the calling parties, whereas the services or protection afforded by Illinois to the Illinois caller and to the call itself do not so vary. They also point out that the percentage of the total mileage between participants in an interstate call that is in Illinois actually tends to vary inversely with the cost of the call. Even if accurate, these observations afford no grounds for invalidation of the tax.

Preliminarily, it can be noted that appellants' complaint would not be solved by the kind of call-by-call apportionment they elsewhere espouse. Whether Illinois were to tax 50% of each two-party interstate call (and 33% of each three-party call, etc.) or, as it now does, 100% of the subset of such calls that are charged to the Illinois party, the kind of relationship that appellants insist must exist between the State and the tax would be equally

lacking. In effect, appellants' fair relation challenge is no more than a revisiting of their apportionment argument.

The Constitution only requires that the tax imposed be fairly related to the activity of the *taxpayer* in the state imposing the tax. Here, the tax is related to the amount of calling activity of the taxpayer in Illinois. As was recognized in *Commonwealth Edison v. Montana*:

> When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and the "advantages of a civilized society."

453 U.S. at 627.

The Constitution requires no direct link between state services and state taxes, except perhaps in the area of user charges such as were at issue in *American Trucking*. As the Court stated in *Commonwealth Edison*, 453 U.S. at 622-23 (1981) (citations omitted):

> [T]here is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. . . . There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on an activity conducted within the State.

Commonwealth Edison states that the fourth prong of *Complete Auto* requires "that the *measure* of a tax must be reasonably related to the extent" of the taxpayer's presence or activities in the state. *Id.* at 626. Here, there

is at least one party, the taxpayer, present in Illinois for the duration of the taxed call, and, of course, the service address to which the call is charged is permanently located in Illinois. The tax is based upon the value the person charging the call to the Illinois number places on the telephone activity. It is measured by what he is willing to pay for the call. Nothing could be more closely related to the taxpayer's activity in Illinois. The fourth prong of *Complete Auto* is thus satisfied.

If appellants' argument on this point were correct, it would have drastic consequences for other types of taxes, such as those on sales, use or gross receipts, that are likewise measured by the cost of the goods or services sold. When someone buys a new automobile that has been manufactured outside the state, the in-state contribution will likely vary little whether the automobile is a Chevrolet or a Cadillac, but the sales tax will vary substantially. If the Court were to strike down the cost of the taxed telephone call as a proper measure of the tax (assuming, of course, that the tax does not discriminate against interstate commerce), it is hard to see how traditional sales taxes and other taxes that are similarly measured could survive.

Any uncertainty about this issue that may have existed at the time appellants prepared their briefs was put to rest by the decision in *Holmes*. There, the Louisiana use tax was measured by the cost to the appellant of the catalogues, which had been printed out of the State and, by the Court's hypothesis, were still a part of interstate commerce at the time they were taxed. Slip op. at 6. Louisiana's method of measurement of its use tax was subject to precisely the same objection made by appellants here, but the Court rejected the challenge:

> *Complete Auto* requires that the tax be fairly related to the benefits provided by the State, but that condition is also met here. Louisiana provides a number of services that facilitate Holmes' sale of merchandise within the State: It provides fire and police protection for Holmes' stores, runs mass transit and maintains public roads which benefit appellant's customers, and supplies a number of other civic services from which Holmes profits. . . . [T]he use tax paid by Holmes, on catalogs designed to increase sales, is related to the advantages provided by the State which aid appellant's business.

Slip op. at 7.

While the telephone calls taxed by Illinois are personal, as well as commercial, the ability to make these calls and to conduct any business is aided by Illinois in the same manner as the distribution of D. H. Holmes's catalogues was by Louisiana. It is plain, therefore, that the Illinois telephone tax is equally related to the taxed transaction as the Louisiana use tax was, and equally valid under the fourth prong of the *Complete Auto* test.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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